U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 09Apr2001

CASE NO.: 2000-LHC-2179

OWCP NO.: 07-154141

IN THE MATTER OF

MICHAEL P. GROS,
Claimant

v.

FRED SETTOON, INC.,
Employer

and

LOUISIANA WORKERS' COMPENSATION CORP.,
Carrier

APPEARANCES:

Daniel J. Nail, Esq.
On behalf of the Claimant

Patricia H. Wilton, Esq.
On behalf of the Employer and Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by Michael P. Gros (Claimant), against Fred Settoon, Inc. (Employer) and Louisiana Workers' Compensation Corp. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before me on December 12, 2000, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced eight exhibits, all of which were admitted into evidence, (CX-1 to CX-8), including Dr. John D. Jackson's (Dr. Jackson) medical records and invoices; Dr. William Kinnard's (Dr. Kinnard) medical records; invoice from University Hospital; invoice from LSU Healthcare Network; invoice from Doctors Hospital of Jefferson; invoice from Neuro Medical Center; and, Claimant's October 19, 2000 deposition. Claimant's counsel submitted post-hearing evidence of a patient referral form from Dr. Jackson's office, which was identified as CX-9 and admitted into evidence.

Employer testified and introduced ten exhibits, all of which were admitted into evidence, (EX-1 to EX-10) including the notice of controversion; notice that compensation payments stopped; correspondence to Louisiana Workers' Compensation Corporation (LWCC) from Claimant's prior counsel, Miles A. Matt, dated September 9, 1996; Claimant's tax records; choice of physician forms; medical records and reports of Louisiana Brain and Spine Clinic; medical records and reports of The Neuromedical Center; medical records and reports of Terrebonne General Medical Center; medical records and reports of Houma Orthopedic Clinic; and, medical records and reports of Culicchia Neurological Clinic. Employer/Carrier's counsel submitted post-hearing evidence of depositions from Melissa Vaughn and Russell Michiels, which were identified as EX-11 and EX-12 respectively and admitted into evidence.

Post-hearing briefs were filed by the parties[1]. Based upon the stipulations of the parties, the

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[1] I left the record open to file supplemental briefs, as well as post-hearing briefs, to take depositions from Michiels and Vaughn concerning the issue of prior authorization for Dr. Jackson's evaluation and treatment, and to take depositions from William Aucoin concerning the alleged offer of suitable alternative employment (SAE), and from Dr. Kinnard concerning Claimant's medical limitations, and whether he requested prior authorization before referring Claimant to Dr. Jackson for neurological evaluation and treatment. However, both counsels tried to expand this and attempted to address other issues, such as causation, and/or present testimony by Vaughn and Michiels concerning SAE in their depositions and/or supplemental briefs. Similarly, Claimant's counsel requested to submit medical records that were not connected to a deposition. Upon agreement of Claimant's counsel and Employer's counsel I will consider the post-hearing medical evidence submitted by Claimant's counsel strictly to confirm Vaughn's testimony regarding prior authorization for treatment by Dr. Jackson and the date said request was made. In addition, I will consider testimony provided by Michiels and/or

evidence introduced, my observation of the witnesses' demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1) and I find:

1. Claimant injured his lower back on March 1, 1996.

2. Claimant's injury was in the course and scope of his employment.

3. An Employer/Employee relationship existed at the time the accident.

4. Employer was timely advised of Claimant's injuries on March 4, 1996.

5. Controversion was filed on August 25, 1999 and September 3, 1999.

6. An informal conference was held in connection with this matter on April 18, 2000.

7. Average Weekly Wage is $410.00.

8. Employer/Carrier paid Claimant state compensation benefits from March 1, 1996 to January 28, 1997, 45 weeks, at $285.00 weekly, totaling $12,825.00.

9. Employer/Carrier paid medical benefits in the amount of $7,000.00 to date.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Jurisdiction.

Vaughn concerning SAE as Aucoin's deposition was not taken. However, any other evidence that exceeded what was authorized, such as testimony concerning causation, is rejected.

2. Date of Maximum Medical Improvement (MMI).

3. Suitable Alternative Employment (SAE).

4. Claimant's entitlement to medical benefits for his treatment with Dr. John Jackson.

5. Attorney's fees and interest.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a thirty-five year old male who completed the fourth grade and began working immediately upon leaving school at the age of fourteen. Claimant can read and write a little bit. (Tr. 24-25, 66). Prior to working for Employer, Claimant worked in the cane fields driving a tractor and truck and scrapping cane. Claimant began working as a laborer for Employer at age 23 in the Shell Oil Field in the Atchafalaya Basin. (Tr. 26-29). Often he had to take a boat through canals to get to the platforms upon which he worked with some of the platforms being on water and some on land. As a laborer, Claimant ran pipeline, demolished and loaded scrap metal on barges. (Tr. 29-32). He would then take the dismantled structures back over the Atchafalaya River to the dock, using a barge crane to load and offload the supplies.

Next Claimant drove dump trucks for Employer for about a year and a half, and then drove vacuum trucks to land locations and water locations. In his last job of vacuum truck driver Claimant drove a truck onto a barge for transportation to well sites in the Atchafalaya Basin. There he pumped residuals from tanks and then returned to land facilities where he drove his truck off the barge and transported the residuals to disposal wells. (Tr. 33-37, 71-73). When not involved in waste disposal Claimant hauled dirt for Employer, stacked pipe on barges, loaded water and other equipment onto barges, and sometimes worked in the shipyard. (Tr. 38-41).

At the time of his injury, Claimant was detailed to a pipe-laying job, for about three weeks, putting concrete weights on a pipeline working from a pipe-laying barge and a smaller barge, which barges relocated about once weekly, on the navigable waters of the Atchafalaya Basin. (Tr. 92). Claimant also helped to load pipe onto the barge. (Tr. 42-50). It was in the final days of this job, on a Friday afternoon, that Claimant felt a sharp pain in his lower back while lifting pipeline weights. Claimant reported the injury to another employee, left the job-site by boat and returned home where
he stayed in bed for four days. (Tr. 52,53). After convalescing for four days, Claimant attempted a return

to work in the shipyard on Wednesday, but could not complete the work day due to back pain. (Tr. 54). He informed Wilbert Aucoin that he had hurt his back the prior Friday and completed an accident report with the assistance of Monique Settoon.

Claimant waited a couple of weeks to see a physician because it took that long to get an appointment with the first physician of his choice, Dr. William Fisher. (Tr. 55-58, 73). Claimant saw Dr. Fisher, a neurosurgeon, on just one occasion, which was paid for by Employer/Carrier. (EX-6). Concerning that visit, Dr. Fisher informed Claimant that it was in the nature of an examination and report with no authorization for tests, x-rays or treatment of any sort, and as such did not constitute a doctor/patient relationship and was designed for a single evaluation. (EX-6, p. 22).

Claimant presented to Dr. Fisher with low back pain, to the right of the midline, with burning and discomfort. Claimant reported to Dr. Fisher his history of a work related back injury sustained in January 1995 while working for Employer and recounted the details of tests results in relation to that accident.[2] Dr. Fisher completed a neuromuscular examination of Claimant, the results of which were essentially normal. Dr. Fisher recommended that Claimant should be referred to another physician for diagnosis and treatment and recommended an MRI scan and possible physical therapy. Dr. Fisher opined that Claimant had likely suffered a lumbar strain.

On April 4, 1996 Claimant was examined by his family physician, Dr. Keith Landry (Dr. Landry), which was paid for by Employer. (Tr. 74-75). Dr. Landry diagnosed Claimant with significant muscle spasm in the paraspinous muscles of the lumbar region. Dr. Landry referred Claimant to Dr. Carson McKowen (Dr. McKowen) for an MRI and prescribed physical therapy. (EX-7, p. 6). Dr. McKowen examined Claimant that same day, on April 4,1996, due to lumbar strain, finding no evidence of nerve root involvement and requested authorization for an MRI. (EX-7, p. 32).

Dr. McKowen ordered an MRI and CT scan, which were completed on April 12, 1996 at Texas Diagnostic Imaging Centers. The MRI of Claimant's lumbar spine indicated a right posterolateral L-3 vertebral body and multilevel disc degeneration but no evidence of disc herniation and no nerve root compression. (EX-7, pp. 19-20).

On April 19, 1996, Dr. Landry examined Claimant again finding rigid muscle spasms, indicating

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[2] Due to Claimant's January 1995 workplace accident, Dr. Landry ordered an MRI of the lumbar spine, which was completed on February 6, 1995 and indicated a one mm lesion circumferential bulge of the disc at L4-5 and a one point five by two cm benign non-fat containing hemangioma involving the L-3 vertebrae. Dr. Landry also ordered a bone scan, which was completed on February 22, 1995 and indicated mildly increased uptake seen overlying the right AC joint likely related to arthropathy and mild increased uptake overlying the right posterior parietal region of the skull, which was unlikely to be of clinical significance. (EX-6, pp. 20-21; EX-8, pp. 3, 5).

a soft tissue injury of muscles and ligaments. Dr. Landry reviewed the MRI results and noted that Claimant had completed one week of physical therapy, ordering that Claimant continue physical therapy three times a week for three more weeks. Dr. Landry prescribed Norflex for pain. (EX-7, p. 7). On April 19, 1996, it was Dr. McKowen who actually wrote the order for Claimant's physical therapy. (EX-7, p. 29).

Claimant attended physical therapy at Pierre Part Physical Therapy with physical therapist Jenny Paine (Paine). Paine reported in a May 8, 1996 note to Dr. McKowen that Claimant attended physical therapy regularly per Dr. McKowen's referral. Claimant received icepacks, ultrasound, egs and exercises to his low back. Claimant reported to Paine that his pain was increasing and Claimant felt he was getting no better. (EX-7, p. 28).

On May 10, 1996, Claimant presented to Dr. Landry with complaints of swelling in the right flank, pain in the right leg and severe back pain. Dr. Landry found muscle spasm in the lumbar region. Dr. Landry referred Claimant for a urinalysis to rule out possible kidney problems, prescribed Soma, and recommended another opinion. (EX-7, p. 8).

On June 17, 1996, Employer referred Claimant to Dr. Robert Applebaum (Dr. Applebaum), who interviewed and examined Claimant on that date. Claimant presented with complaints of burning low back pain, and swelling in his right side, but denied any pain in his legs. (EX-10, p. 2-4). Dr. Applebaum recounted the details of Claimant's March 1, 1996 workplace injury and the treatment he received for such, as well as Claimant's prior injuries and the treatment received for such. Dr. Applebaum examined Claimant finding minimal mechanical findings and no neurological findings. He opined that Claimant did not have disease or damage involving the spinal cord or nerve roots, and from a neurological standpoint had reached MMI. He diagnosed claimant with low back pain of undetermined etiology, possibly related to the lesion in the L3 vertebral body. Dr. Applebaum recommended continued symptomatic treatment and an orthopedic evaluation in regard to a possible cyst and whether Claimant was able to return to work at that time.

On July 11, 1996, Claimant presented to Dr. Landry with continued pain in the lower back and right flank, as well as back pain which was prompted by pressing on Claimant's abdomen. Dr. Landry found muscle spasm in the in the lumbar region. Dr. Landry prescribed Flexeril for pain. (EX-7, p. 9). On July 22, 1996 a CT scan of Claimant's lumbar spine was completed at Thibodeaux Regional Medical Center, which indicated an L-3 vertebral cyst. Bloodwork was also completed on July 24, 1996 at Thibodeaux Hospital and Health Centers, which was essentially normal. On July 26, 1996, subsequent to completion of his CT scan and blood work, Dr. Landry examined Claimant, who presented with right-sided abdominal and flank pain. Dr. Landry opined that the results of Claimant's bloodwork were essentially normal and his CT scan revealed a benign cyst on the right side of the vertebral body of L3, which Dr. Landry recommended be left alone. Dr. Landry recommended that Claimant see a surgeon due to the continued pain he experienced. (EX-7, p. 10).

Claimant saw Dr. McKowen again on August 27, 1996 upon referral from Dr. Landry and due to continued back pain. Dr. McKowen recommended that Claimant follow up with an orthopedic surgeon

as he had nothing to offer Claimant but a prescription for Parafon Forte. Dr. McKowen also recommended a physical capacities evaluation, finding tightness in Claimant's paraspinous muscles of the lumbar region and possible symptom magnification. (EX-7, p. 11).

Claimant next requested to see Dr. Kinnard, an orthopedic surgeon, who examined Claimant on a few occasions, ultimately releasing Claimant from his care, saying that he had nothing to offer Claimant. (Tr. 58, 76). Dr. Kinnard first examined Claimant on September 27, 1996, finding evidence of ongoing pain with a coincidental lesion within the L3 vertebral body. (EX-9, p. 7). Dr. Kinnard ordered a bone scan of Claimant, which was completed on September 30, 1996 and indicated probable arthritic change in the right AC joint and a tiny focus of increased activity in the right posterior parietal skull of doubtful significance. (EX-8, p. 7).

On October 3, 1996, Dr. Kinnard examined Claimant again finding that he suffered from a lumbosacral strain. Dr. Kinnard ordered a progressive physical therapy program for pain relief and muscle strengthening. (EX-9, p. 4). Claimant saw Dr. Kinnard again on December 12, 1996 with continued complaints of burning sharp pain in the lower back and requested that Dr. Kinnard refer him to Dr. Jackson.

Dr. Kinnard scheduled an appointment with Dr. Jackson at Claimant's request per Claimant's request. (EX-9, p. 8). Dr. Kinnard, who was to contact Employer seeking approval for such referral apparently did not do so. (Tr. 78-80). Claimant did not personally seek authorization because he thought they would not pay for such care as they had stopped his compensation payments on January 28, 1997. (Tr. 84-86). In addition, in a January 28, 1997 letter to Employer/Carrier, Dr. Kinnard stated that he released Claimant to be able to return to work within the duties outline on the job description form. (Tr. 67-68; EX-9, p. 2; CX-3).

Claimant was informed that his compensation stopped because Dr. Kinnard had released Claimant to light duty work. (Tr. 83, 86-90). Conversely, Vaughn testified that Dr. Kinnard released Claimant to full duty and that Claimant was able to return to his regular duties as a truck driver. Vaughn testified that she faxed said full duty release to Claimant's attorney at that time, Miles Matt (Matt). (Tr. 90-92; EX-11, p. 14). Neither party submitted evidence to the record indicating whether Matt received said fax. Claimant was not informed that Employer had work available for him. (Tr. 137-38).

The full duty job description signed by Dr. Kinnard specified that Claimant could lift up to ten pounds. Claimant testified that as a truck driver he had to lift truck tires and rims, which weighed up to one hundred pounds and when he worked on the barges, he had to lift hoses up to fifty pounds and concrete blocks weighing one hundred twenty pounds. On January 9, 1997, Dr. Kinnard signed a description of Claimant's job which indicated that Claimant: (1) had to sit for seven hours daily; (2) did not have to squat, crouch, crawl, reach above shoulder level or kneel; (3) had to occasionally bend, stoop, and climb; (4) had to frequently push/pull with the truck clutch; and, (5) was required to lift up to ten pounds. (CX-3). Carrier received the signed job description on January 30, 2997. Dr. Kinnard never reviewed this job

description with Claimant. Claimant has not worked for wages for anybody since March 1, 1996, the date of his injury. (Tr. 63). Since March 25, 1999, Claimant has been collecting social security, which is his sole source of income.

On February 4, 1997 Dr. Jackson's office contacted Vaughn, Employer's adjuster, requesting prior authorization to treat Claimant. (EX-11, pp. 14, 18; CX-9). Vaughn denied authorization for treatment by Dr. Jackson and testified that she would have never authorized Claimant to see another neurosurgeon because he had already seen three neurosurgeons by that time. (EX-11, p. 16; CX-9). Claimant's file was subsequently transferred to another adjuster, Russell Michiels (Michiels). (EX-11, p. 17).

On March 3, 1997 Claimant was examined by Dr. Jackson, a neurosurgeon. Claimant paid for the visit himself because Employer refused authorization. On August 18, 1997, Dr. Jackson issued a medical report stating that he reviewed the April 12, 1996 MRI scan of Claimant's back and found a possible small midline bulging disc at L5-S1 and at the L4-5 level there was a more circumscribed bulge of disc that tended to flatten the dura, but did not encroach onto the neural foramina, which were patent. (CX-2). Consequently, Dr. Jackson recommended a lumbar myelogram followed by a CT scan to determine if Claimant had a disc pathology requiring surgery, but Employer would not approve said diagnostic procedures. (Tr. 59-61).

On February 4, 1998, Dr. Jackson issued a medical report stating that he received an MRI scan of Claimant's lumbar spine performed on January 10, 1998 at the Medical Center of Louisiana in New Orleans, which revealed early degeneration of the L2-3, 3-4, 4-5 disc spaces, with the L2-3 disc space being slightly narrowed. Dr. Jackson saw evidence of a hemangioma in the body of L3 and noted the L4-5 disc space to bulge appreciably and create a stenosis at one level. Also the ligamentum flavum were thickened at the level of stenosis so that the slight bulge of the disc with the ligamentum flavum caused constriction and narrowing of the caudal sac at one level at the L4-5 disc space. Consequently, Dr. Jackson continued to recommend a lumbar myelogram followed by a CT scan. (CX-2).

Dr. Jackson examined Claimant again on July 13, 1998, who presented with continued complaints of low back pain. Claimant had gone to Charity to the LSU Service, but the physicians there would not perform a myelogram or CT scan, as requested by Dr. Jackson. Claimant reportedly had another MRI scan performed at Charity, but Dr. Jackson did not see it. Dr. Jackson again recommended that Claimant have a myelogram and CT scan due to his bulging L4-5 disc, which Dr. Jackson opined had probably gotten worse. (CX-2).

On July 19, 1999, Dr. Jackson issued a medical report stating that he received Claimant's myelogram and CT scan done at Doctors Hospital on July 14, 1999. The myelogram revealed two degenerative discs, one ruptured and one bulging. Dr. Jackson opined that this accounted for Claimant's complaints of pain in the low back and lower extremity. Dr. Jackson noted that Claimant had gotten quite depressed due to his physical problems and had gone to the emergency room several times for pain

medication to give him relief. Dr. Jackson recommended surgery to provide probable permanent relief and rehabilitation for Claimant, which surgery has yet to be performed due to Employer's lack of approval. (CX-2).

In a June 29, 2000 letter to Employer/Carrier, Dr. Kinnard stated that he had reviewed the lumbar myelogram with an enhanced CT scan performed on Claimant on July 14, 1999 and found that Claimant had evidence of a lumbar disc herniation and a nerve root cutoff on the right at L4-5. Dr. Kinnard stated in the letter that he found the treatment recommended by Dr. Jackson, surgery, appropriate for Claimant's diagnosis, disc herniation. (EX-9, p. 1; Tr. 62-63, 67, 96).

B. Claimant's Testimony Concerning Pain

Claimant recounted the facts of his workplace injury and the treatment he received for said injury. (Tr. 23). Since March 1, 1996, the date of his injury, Claimant is no longer able to complete many activities without pain. He can mow the yard with a riding mower, sitting on an eight inch cushion and operating the mower in the slowest gear possible. (Tr. 63-64). Claimant assist with light cooking and housework. Claimant is able to fish for spans of four to five hours to pass the time, as long as he is able to periodically get up and change positions. (Tr. 81-82). Claimant testified that he could do any other activity for four to five hours a day, as long as he is able to change positions and keep himself comfortable and not put himself in an awkward position that would cause a furtherance of his pain.

Nonetheless, Claimant suffers from burning sensations, sharp pain, and swelling in his back. He also suffers from numbness and burning sensations in his legs from the knee to the foot if he walks too long, sits too long or lays down too long. (Tr. 84-85). At the time of the hearing, Claimant had a busted lip because his legs had given out on him a few days prior while brushing his teeth and he fell head first into the tub. A couple of months after injuring his back, Claimant began having trouble with his abdomen and is now on panic disorder medication. (Tr. 65-67).

C. Testimony of Claimant Witness, Shayne Tatum

Shayne Tatum (Tatum) also worked for Employer at the same time as Claimant and testified concerning Claimant's workplace activities and injury subject to the instant claim. (Tr. 98-102). Tatum drove trucks and worked on the pipeline alongside Claimant. Thus, Tatum testified corroborating Claimant's testimony about Employer's workplace environment. Tatum testified that he traveled back and forth to Employer's worksite on a motorboat. Also corroborating Claimant's testimony, Tatum testified

that they had to lift concrete blocks weighing one hundred twenty-five pounds and truck rims and tires that weighed about eighty pounds. They also had to lift and change truck batteries and handle eight twenty foot sections of hose, with each twenty foot section weighing about thirty to forty pounds.

Concerning Claimant's workplace accident, which is the subject of the instant claim, Tatum was on the deck of the "big barge," about thirty to forty feet away from Claimant when he witnessed Claimant grabbing his back when Claimant had an accident on the deck of the "small barge," suffering a back injury. (Tr. 104-06). Corroborating Claimant's testimony, Tatum testified that he witnessed such events late in the work day.

D. Testimony of Claimant Witness, Lynwood Aucoin

Lynwood Aucoin (Aucoin) worked for Employer at the same time as Claimant as a welder. Aucoin testified concerning Claimant's workplace activities and injury subject to the instant claim. (Tr. 110-11). Aucoin gave Claimant a ride home from work on March 1, 1996 and Claimant reported to Aucoin during that trip that he had hurt his back that day lifting a hoist at work.

E. Testimony of Employer Witness, Greg Anthony Gravois

Greg Anthony Gravois (Gravois) worked for Employer as a foreman in direct supervision over Claimant. (Tr. 113-19). Gravois testified that Claimant spent about ninety to ninety five percent of his working time on the land driving trucks, leaving five to ten percent of the time to have been spent by Claimant over water. Gravois testified that Employer had work available for Claimant as a truck driver in December 1996, when Dr. Kinnard released Claimant to drive trucks. Gravois further testified that he thought Employer would have "found something" that could have accommodated any difficulties or limitations Claimant may have had.

F. Testimony of Employer Witness, Fred Settoon

Fred Settoon (Settoon) was the owner of Fred Settoon, Inc., at the time of Claimant's March 1, 1996 workplace accident. (Tr. 125). Settoon testified that Claimant spent ninety five percent of his time driving vacuum trucks on land for Employer. (Tr. 126). Settoon testified that two to three times a year

Claimant would make a trip onto a barge to vacuum out tanks for Employer. Settoon later testified that about once a month Claimant would drive his truck onto a barge and the barge would take him to a platform, and working from the barge, Claimant would vacuum out the tanks. (Tr. 134-36). Settoon testified that Claimant had been assigned to do pipeline work several times in the past, as well as the pipeline job that Claimant was assigned to, which has been the subject of the instant claim and March 1, 1996 workplace injury suffered by Claimant. (Tr. 127-30). Settoon further testified that the pipeline job that Claimant was working when he was injured on March 1, 1996 lasted about two weeks, and not three weeks as presented by Claimant and Tatum.

Settoon testified that following Dr. Kinnard's release of Claimant, Wilbert Aucoin informed Claimant that Employer had truck driving work available for him. (Tr. 131). Settoon testified that if Claimant had returned to work driving trucks and had a back injury, Employer would have assigned someone to help Claimant with the truck. The alleged employment offer was not confirmed by a letter to Claimant.

G. Testimony of Employer Witness, Melissa Vaughn

Melissa Vaughn (Vaughn), Employer's adjustor originally assigned to Claimant's compensation claim, was deposed on February 23, 2001 by Claimant's counsel, Daniel J. Nail, and Employer's counsel, Patricia H. Wilton. Vaughn testified that by the time Claimant's claim was reported to her, Claimant had already chosen to see Dr. Fisher, a neurosurgeon at the NeuroMedical Center. (EX-11, pp. 5-8). Claimant next saw Dr. Keith Landry, a general practitioner of Claimant's choosing. Claimant next completed a choice of physician form, choosing to see Dr. McKowen, a neurosurgeon. (EX-5). Employer then sent Claimant to Dr. Applebaum, a neurosurgeon, for a second opinion. Claimant subsequently completed a choice of physician form, choosing to see Dr. William Kinnard, an orthopedic. (EX-11, p. 9).

Vaughn testified that Dr. Kinnard released Claimant to full duty and that Claimant was able to return to his regular duties as a truck driver. Employer filled out a job description form indicating the alleged nature of Claimant's duties as a truck driver, which form Dr. Kinnard signed. (EX-11, pp. 10, 12). The full duty description reflected that Claimant would not have to lift more than ten pounds, and Vaughn admitted that if the position required Claimant to lift more than ten pounds, he could not perform the work. (EX-11, p. 18). Vaughn testified that she faxed said full duty release to Claimant's attorney at that time, Matt. (EX-11, p. 14). Vaughn described the position available as light duty, when by her own admission the position was full duty and involved Claimant's regular duties as a truck driver. (EX-11, pp. 11-12). Vaughn testified that she does not remember why she described the position as light duty because it was her understanding that Claimant had been released to return to his regular work, as noted on the full duty job description form.

Vaughn testified that upon Claimant's request, Dr. Kinnard referred Claimant to Dr. Jackson for treatment and Vaughn subsequently received a request from Dr. Jackson's office to treat Claimant. (EX-11, pp. 14, 18). Vaughn denied authorization for treatment by Dr. Jackson and testified that she would have never authorized Claimant to see another neurosurgeon because he had already seen three neurosurgeons by that time. (EX-11, p. 16). Vaughn does not recall if Dr. Jackson's office made such a request prior to treating Claimant. (EX-11, pp. 18-20). Claimant's file was subsequently transferred to another adjuster, Russell Michiels (Michiels). (EX-11, p. 17).

H. Testimony of Employer Witness, Russell Michiels

Michiels, Employer's senior claims representative assigned to Claimant's case in April 1998, was deposed on February 23, 2001 by Claimant's counsel, Daniel J. Nail, and Employer's counsel, Patricia H. Wilton. (EX-12, p. 5). Michiels testified that when he received Claimant's file his compensation had already been stopped based on medical documentation that Claimant had been released to work. Michiels testified that Dr. Jackson was an unauthorized physician because Claimant had already had his choice of four physicians and no one contacted Vaughn for authorization for treatment by Dr. Jackson. (EX-12, pp. 6, 15). After Claimant's file was assigned to Michiels, Claimant's attorney contacted Michiels requesting that Claimant be reimbursed for treatment administered by Dr. Jackson and for authorization that Claimant receive further treatment from Dr. Jackson. (EX-12, pp. 6-8, 17).

Michiels testified that Dr. Kinnard referred Claimant to Dr. Jackson for treatment based upon Claimant's request to do so. (EX-12, pp. 9-12). Michiels testified that Dr. Kinnard had released Claimant to return to work at his regular job and that Vaughn faxed Claimant's then attorney, Matt, a note offering Claimant his regular position with Employer. Subsequent to the April 18, 2000, informal conference concerning the instant matter, Michiels requested that Claimant return to see Dr. Kinnard. Upon that examination, Dr. Kinnard concluded that he agreed with the diagnosis that Dr. Jackson made, that surgery was recommended. Furthermore, Michiels admitted that no physician prior to Dr. Jackson completed a myelogram, a basic form of examination for diagnostic purposes and a test often completed for the purpose of determining whether one has a herniated disk. (EX-12, pp. 14-16).

Contentions of the Parties

Claimant asserted that: (1) jurisdiction existed under the Act, thus he had maritime status at the time of his March 1, 1996 workplace accident, and SAE was not established, thus Claimant is due temporary total disability from the date of his accident to the present and continuing; (2) Claimant is entitled to reimbursement for all expenses incurred in seeking medical attention from Dr. Jackson to date because he sought prior authorization from Employer, who refused to provide the requested medical treatment, which

was reasonable and necessary, and further, Claimant is entitled to all reasonable and necessary future medical expenses for treatment of his back injury by, or at the direction of, Dr. Jackson under Section 7 of the Act; and (3) Claimant is entitled to interest and attorney's fees.

Employer/Carrier asserted that: (1) Claimant did not have maritime status at the time of his March 1, 1996 workplace injury, thus jurisdiction is lacking and Claimant is not entitled to benefits under the Act; (2) if jurisdiction does exist, Claimant's reached MMI as of December 12, 1996, based on a report by Dr. Kinnard, as a result of whatever injuries he sustained while working for Employer in March 1996, was released to his position as a truck driver, and Employer had such a position available, at the same rate of pay, which was offered to Claimant; (3) Employer further contends that Claimant is not due medical benefits for his treatment with Dr. Jackson as the there was no prior request for authorization or approval to change physicians to Dr. Jackson before the initial evaluation and subsequent treatment was conducted.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F. 2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Jurisdiction

When Congress overhauled the Act in1972 it expanded both the term "employee" and the concept

of coverage. Section 902(3) was amended to read as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 903(a) was amended to read as follows:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)....

As a result of these amendments it has become clear that in order for a claimant to be coverage under the Act as amended in 1972, they must satisfy both a "status" and "situs" test. In Herb's Welding, Inc., v. Gray 470 U.S. 416 (1985), 105 U.S. 1421 at 1423 (1985) the Supreme Court stated:

> The Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U.S.C.§ 901 *et. seq.*, provided compensation for the death or disability of any person engaged in "maritime employment," § 902(3) if the disability or death results from an injury incurred upon navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing or building a vessel § 903(a). Thus a worker claiming under the Act must satisfy both a "status" and a "situs test"

The term "situs" has been broadly interpreted to include land not contiguous to navigable water provided among other things that the site is suitable for maritime purposes and proximate to or close as possible given all circumstances navigable waterway. In Texports Stevedore Co. v. Winchester, 632 F. 2d 504 (5th Cir. 1980), the Fifth Circuit at 513-514, in defining what an adjoining area was, stated:

> The situs requirement compels a factual determination that cannot be hedged by the labels placed on an area....Just as we disapprove of a test that disposes of the question based totally on the presence of intervening or surrounding maritime facilities, we also reject the idea that Congress intended to substitute for the shoreline another hard line. Growing ports are not hemmed in by fence lines; the Act's coverage should not be either. All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes. We would not extend coverage in this case to downtown Houston. The site must have some nexus with the waterfront.

> Although "adjoin" can be defined as "contiguous to" or "to border upon," it also is defined as "to be close to" or "to be near". "Adjoining can mean "neighboring." To instill in the term its broader meaning is in keeping with the spirit of the congressional purposes. So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the LHWCA

Later the Fifth Circuit in Textports at 515 stated "area" is defined by its function, i.e., it must be customarily, but not exclusively used by an employer to load, unload, repair or build a vessel. In addition, the Fifth Circuit has stated that the area to be examined is the place of injury and its relationship to navigable waters. Jacksonville Shipyards v. Perdue, 539 F.2d 535 (5th Cir.1976) vacated and remanded on other grounds, 433 U.S. 904 (1977). See Nelson v. Gray F. Athinson Construction Co. 29 BRBS 39 (1995); Brown v. Bath Iron Works Corp., 22 BRBS 384, 389 (1989); Davis v. Dovan Co. of California, 20 BRBS 121 (1987) aff'd mem. 865 F.2d 1257 (4th Cir 1989); Lasofsky v. Arthur J. Trickle Engineering Works, Inc., 20 BRBS 58 (1987), aff'd mem. 853 F. 2d 919 (3rd Cir. 1988).

Employer does not contest its maritime situs in that Claimant was on navigable waters when he was injured. Employer, however contends that the status requirement was not met. For the reasons set forth below, I do not agree, but rather find that the status requirements under the Act have been met.

There is no legislative definition of "maritime employment." Cong.Rec.S11623 Sept. 20, 1984. As such, this aspect of the Act has been left to the courts to define. The Board has held, in an unpublished opinion, that when a worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under Section 2(3). The Board stated, "[r]egardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision." Griffin v. McLean Contracting Co., 32 BRBS 87 (1998). Again, also in dicta, the Board in Griffin stated that, "injury on actual waters is sufficient to establish coverage under both sections 2(3) and 3(a) of the Act." Id. This holding is based on the Board's interpretation of a Supreme Court holding that the 1972 Amendments to the Act did not disclose any Congressional intent to withdraw coverage from those workers injured on navigable waters in the course of their employment who would have been covered by the Act before 1972. Director, OWCP v. Perini North River Associates, 459 U.S. 297 (1983).

Status is an occupational test requiring an examination of the character of the work to see whether the employee's activities bear a significant relationship to traditional maritime activity. Status may be determined either upon the maritime nature of Claimant's activity at the time of his injury or upon the maritime nature of his employment as a whole. Miller v. Central Dispatch, Inc., 673 F.2d 773, 781(1982); Thibodaux v. Atlantic Richfield Co., 580 F.2d 841 (5 th Cir 1978), cert denied, 442 U.S. 909, 99 S. Ct. 2820. The first alternative is referred to as the "moment of injury" test while the second alternative requires only that the claimant spend **"some" portion of his overall employment performing maritime activities**. Northeast Marine Terminal Co., v. Caputo, 432 U.S. at 273, 97 S. Ct. at 2362, P.C. Pfeiffer

Co. v. Ford, 444 U.S. at 812, 100 S. Ct. at 337; Boudloche v. Howard Trucking Co., 632 F.2d 1346 (5th Cir. 1980); See also Lennon v. Waterfront Transport, 20 F.3d 658 (5th Cir. 1994). Although an employee is covered if some portion of his activities constitute covered employment, those activities must be more than "episodic, momentary or incidental to non-maritime work." Boudloche, 632 F.2d at 1346.

In Bienvenu v. Texaco, Inc., 164 F.3d 901 (5th Cir. 1999)(*en banc*), the Fifth Circuit held that a worker who is aboard a vessel either transiently or fortuitously, even though technically in course of his employment, does not enjoy coverage under the Act. The court declined to set an exact amount of work performance on navigable waters sufficient to trigger coverage under the Act, instead leaving that task to case-by-case development. The court did, however, state that a "worker injured on the [navigable] water and who performs a "not insubstantial" amount of his work on navigable waters is neither transient nor fortuitous." The court went on to state that the threshold amount must be greater than a modicum of activity in order to preclude coverage to those employees who are merely commuting from shore to work by boat. Also, the routine activity of assisting in tying the

vessel to the dock and loading or unloading one's tools and personal gear onto the vessel do not count as meaningful job responsibilities.

"[I]n Parker v. Motor Boat Sales, 314 U.S. 244 (1941), one of the Supreme Court cases on which the Bienvenu Court relied, the Court held that a janitor who was killed in an accident while accompanying a salesman [co-worker] during a demonstration of a motor boat was covered under the Act. The Court reasoned that habitual performance of other duties on land did not alter the fact that at the time of the accident the employee was riding in a boat on navigable water, and cited Section 2(4) of the Act, which provides for its application to 'employees [who] are employed ... in whole or in part upon the navigable waters of the United States.'" Ezell v. Direct Labor, Inc., 33 BRBS 19 (1989) *citing* Id., 314 U.S. at 247; *see* 33 U.S.C. § 902(4)(1994).

In Mcgoey v. Chiquita Brands International, 30 BRBS 237 (1997), the Board held that the Administrative Law Judge's finding that claimant spent three to five percent of his time in a covered activity alone was enough to invoke coverage under Caputo and Boudloche, *citing* Ferguson v. Southern States Cooperative, 27 BRBS 16 (1993). The Fifth Circuit has summarized its rule stating "a claimant will meet the status requirement of the Act, not only if he is engaged in maritime employment at the time of injury, but also if he spends some portion of his overall employment engaged in maritime activities." Hullinghorst Industries, Inc., v. Carroll, 650 F.2d 750 at 755 (1981). In Hullinghorst, the Fifth Circuit noted that it was clear that the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lied within the scope of "maritime employment" as that term was used in the Act. *See also* Peterson v. General Dynamics Corp., 25 BRBS 71 (1991).

Similarly, in the instant case, Claimant spent at least five to ten percent of his time in a covered activity, which is enough to invoke coverage under the Act. Although Employer's counsel argued in their

post-hearing brief that Claimant's work activity on the water during the duration of his employment with Employer was something less than five percent of his total work time, that is contrary to the testimony provided by Employer. Gravois indicated that Claimant spent five to ten percent of his time performing work activities over water. Settoon, the owner of Employer's business, testified that Claimant spent ninety five percent of his time driving vacuum trucks on land for Employer, leaving the other five percent to have been spent performing work activities over water. (Tr. 126). Notably, Settoon later testified that about once a month Claimant would drive his truck onto a barge and the barge would take him to a platform, and working from the barge, Claimant would vacuum out the tanks. (Tr. 134-36). Settoon testified that Claimant been assigned to do pipeline work several times in the past, as well as the pipeline job that Claimant was assigned to, which has been the subject of the instant claim and March 1, 1996 workplace injury suffered by Claimant, which activity clearly lied within the scope of "maritime employment" as that term was used in the Act. (Tr. 127-30). According to the evidence presented to the record, Claimant spent at least five to ten percent of his time in a covered activity, a 'not insubstantial' amount of his work on navigable waters, which was neither transient nor fortuitous. Bienvenu, 164 F.3d 901.

B. Claimant's Prima Facie Case, Nature and Extent of Disability and Suitable Alternative Employment

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act **it shall be presumed**, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a)(emphasis added).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a *prima facie* case of a compensable "injury" supporting a

claim for compensation. Id.

Once Claimant's *prima facie* case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them. The burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that Claimant's employment did not cause, contribute to or aggravate his condition. Gooden v. Director, OWCP, 135 F.3d 1066 (5th Cir. 1998); Peterson v. General Dynamics Corp., 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. E & L Transport Co. v. N.L.R.B., 85 F.3d 1258 (7th Cir. 1996).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The presumption is not rebutted merely by suggesting an alternative way that Claimant's injury may have occurred. Williams v. Chevron, USA, 12 BRBS 95 (1980). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 144 (1990); Holmes v. Universal Maritime Service Corporation, 29 BRBS 18, 21 n.3 (1995). If the Employer rebuts the presumption, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. Devine v. Atlantic Container Lines, G.I.E., 23 BRBS 279 (1990).

In this case, the parties have stipulated that an accident occurred in the course and scope of Claimant's employment with Employer on March 1, 1996. Employer offered no evidence to rebut this presumption, thus, Claimant established his *prima facie* case under Section 20(a) that his injury arose out of employment. However, this presumption does not establish entitlement to either compensation or benefits under the Act until Claimant establishes the nature and extent of his disability.

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra.; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

Employer argued that Claimant reached MMI as of December 12, 1996, based on a report by Dr. Kinnard, as a result of whatever injuries he sustained while working for Employer in March 1996, when Claimant was released to his position as a truck driver. However, based on the objective medical evidence, Claimant's condition never stabilized, as he has suffered from ongoing pain due to his March 1, 1996 workplace back injury. Due to Claimant's ongoing pain, Dr. Jackson performed a necessary and reasonable diagnostic procedure, a myelogram, a test often completed for the purpose of determining whether one has a herniated disk, which amazingly had not been performed by any other treating physician, which test revealed that Claimant indeed suffers from one ruptured and one bulging disc, and for which surgery is the recommended treatment. (EX-12, pp. 14-16). Notably, after reviewing the results of the myelogram completed by Dr. Jackson, Dr. Kinnard agreed with Dr. Jackson, finding the treatment recommended by Dr. Jackson, surgery, appropriate for Claimant's diagnosis, disc herniation. (EX-9, p. 1; Tr. 62-63, 67, 96). Thus, I find that Claimant has not yet reached MMI.

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

Once the case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment (SAE). Turner, 661 F.2d at 1038; P&M Crane, 930 F.2d at 430; Clophus v. Amoco Prod. Co., 21 BRBS 261(1988). Total disability becomes partial on the earliest date on which the employer establishes SAE. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT) (D.C. Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991). An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18

BRBS 224 (1986). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market. Conover v. Sun Shipbuilding & Dry Dock Co., 11 BRBS 676, 679 (1979). If employer does not offer suitable work at its facility, the Fifth Circuit in Turner, established a two-pronged test by which employers can satisfy their alternative employment burden:

> (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.
>
> 661 F.2d at 1042; P&M Crane, 930 F.2d at 430.

If the employer meets its burden by establishing SAE, the burden shifts to the claimant to prove reasonable diligence in attempting to secure some type of SAE shown within the compass of opportunities, by the employer, to be reasonably attainable and available. Turner, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. Applebaum v. Halter Marine Serv., 19 BRBS 248 (1987). Moreover, if the claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). If the claimant fails to satisfy this "complementary burden," there cannot be a finding of total and permanent disability under the Act. Turner, 661 F.2d at 1043; Southern v. Farmers Export Co., 17 BRBS 64 (1985).

Employer argued that Claimant was released to his regular duties as a truck driver by Dr. Kinnard, and that Employer had such a position available, at the same rate of pay, which was offered to Claimant, thus establishing SAE. The record contains a full duty job description, signed by Dr. Kinnard, that did not comport with Claimant's actual workplace duties as presented in credible testimony by Claimant and Tatum. Vaughn testified that Dr. Kinnard released Claimant to full duty and that Claimant was able to return to his regular duties as a truck driver. Employer filled out a job description form indicating the alleged nature of Claimant's duties as a truck driver, which form Dr. Kinnard signed. (EX-11, pp. 10, 12). The full duty description reflected that Claimant would not have to lift more than ten pounds, and Vaughn admitted that if the position required Claimant to lift more than ten pounds, he could not perform the work. (EX-11, p. 18).

Claimant testified that as a truck driver he had to lift truck tires and rims, which weighed up to one hundred pounds and when he worked on the barges, he had to lift hoses up tp fifty pounds and concrete

blocks weighing one hundred twenty pounds. I find Claimant's testimony to be credible and corroborated by Tatum's testimony. Vaughn testified that she does not remember why she described the position as light duty because it was her understanding that Claimant had been released to return to his regular work, as noted on the full duty job description form. I find that the testimony presented by Employer/Carrier was not credible and the position allegedly available did not comport to the restrictions set forth by Dr. Kinnard. Furthermore, there was no evidence to confirm that a job offer was in fact made and Employer failed to show the presence of any SAE.

Accordingly, based on the foregoing I find that: (1) Claimant clearly could not perform his past work for Employer; (2) Employer failed to show SAE; (3) Claimant never reached MMI in that he still needs surgery to correct his back condition. Thus, Claimant is entitled to temporary total disability compensation benefits from March 1, 1996 and continuing, based on his average weekly wage of $410.00.

E. Entitlement to Medical Care and Benefits

Pursuant to Section 7(a) of the Act, 33 U.S.C. § 907(a), Employer is responsible for reasonable and necessary medical expenses that are related to Claimant's compensable injury. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979); Pardee v. Army & Air Force Exchange Serv., 13 BRBS 1130 (1981). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. Pardee, 13 BRBS at 1130; Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, but not due to an intervening cause. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'g* 12 BRBS 65 (1980). Furthermore, an employee's right to select his own physician, pursuant to section 7(b), is well settled. Bulone v. Universal Terminal and Stevedore Corp., 8 BRBS 515 (1978).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982) (*per curiam*), *rev'g* 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc.,16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983).

Consent to change physicians *shall* be given when the employee's initial free choice was not of a specialist whose services are necessary for, and appropriate to, proper care and treatment. Consent may be given in other cases upon a showing of good cause for change. Slattery

Associates, Inc. v. Lloyd, 725 F.2d 780, 786, 16 BRBS 44 (CRT) (D.C. Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982). The regulation only states that an employer *may* authorize a change for good cause; it is not *required* to authorize a change for this reason. Swain, 14 BRBS at 665.

Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek employer's approval. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988). The claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at the employer's expense. Rieche v. Tracor Marine, 16 BRBS 272 (1984); Wheeler v. Interocean Stevedoring, 21 BRBS 33 (1988). The employee need not request treatment when such a request would be futile. Shell v. Teledyne Movable Offshore, 14 BRBS 585, 590 n.2 (1981).

Section 7(d)(2) of the Act provides in pertinent part that:

> (2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so.

33 U.S.C. § 907(d)(2).

An employer's physician's statement that the employee is recovered and discharged from treatment may be tantamount to the employer's refusing to provide treatment. Shahady, 682 F.2d at 970; Walker v. AAF Exch. Serv., 5 BRBS 500 (1977); Buckhaults v. Shippers Stevedore Co., 2 BRBS 277 (1975), as may be testimony by employer's physicians at the hearing opposing the treatment request, Atlantic & Gulf Stevedores v. Neuman, 440 F.2d 908 (5th Cir. 1971), a mistaken diagnosis, Cooper Stevedoring v. Washington, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977), *aff'g* 3 BRBS 474 (1976); Matthews v. Jeffboat, Inc., 18 BRBS 185 (1986); McGuire v. John T. Clark & Son, Inc., 14 BRBS 298 (1981), or employer's physician urging that the employee return to work. Rivera v. National Metal & Steel Corp., 16 BRBS 135 (1984). Where an employer's physician's actions constitute a refusal of treatment, the employee is justified in seeking treatment elsewhere, without the employer's authorization, and is entitled to reimbursement for necessary treatment subsequently procured on his own. Matthews, 18 BRBS at 189; Rivera, 16 BRBS at 138.

As discussed above, jurisdiction existed and Claimant's March 1, 1996 workplace injury was sustained in the course and scope of his employment. I find that Claimant's first choice of physicians, Dr. Fisher, was not in fact a treating physician because Dr. Fisher specifically informed Claimant that the visit was in the nature of an examination and report with no authorization for tests, x-rays or treatment of any sort, and as such did not constitute a doctor/patient relationship and was designed for a single evaluation.

(EX-6, p. 22). Claimant next chose to see his family physician, Dr. Keith Landry, which was paid for by Employer. (Tr. 74-75). Dr. Landry referred Claimant to Dr. McKowen for treatment. (EX-7, p. 6).

Upon Employer's request, Claimant next submitted to an examination by Dr. Applebaum. Dr. Applebaum recommended continued symptomatic treatment and an orthopedic evaluation in regard to a possible cyst and whether Claimant was able to return to work at that time. On July 26, 1996, subsequent to completion of his CT scan and blood work, Dr. Landry examined Claimant and recommended that Claimant see a surgeon due to the continued pain he experienced. (EX-7, p. 10).

Claimant saw Dr. McKowen again on August 27, 1996, upon referral from Dr. Landry, and due to continued back pain. Dr. McKowen recommended that Claimant follow up with an orthopedic surgeon as he had nothing to offer Claimant but a prescription for Parafon Forte. (EX-7, p. 11).

Claimant next requested to see Dr. Kinnard, an orthopedic surgeon, who examined Claimant on a few occasions, ultimately releasing Claimant from his care, saying that he had nothing to offer Claimant. (Tr. 58, 76). After being informed that Drs. McKowen and Kinnard had nothing further to offer him, and due to continued pain, Claimant requested a referral from Dr. Kinnard to Dr. Jackson, which referral Dr. Kinnard made.

On February 4, 1997 Dr. Jackson's office contacted Vaughn, Employer's adjuster, requesting prior authorization to treat Claimant. (EX-11, pp. 14, 18; CX-9). Vaughn denied authorization for treatment by Dr. Jackson and testified that she would have never authorized Claimant to see another neurosurgeon because he had already seen three neurosurgeons by that time. (EX-11, p. 16; CX-9).

On March 3, 1997 Claimant was examined by Dr. Jackson. After Dr. Jackson reviewed the April 12, 1996 MRI scan of Claimant's back he recommended a lumbar myelogram followed by a CT scan to determine if Claimant had a disc pathology requiring surgery, but Employer would not approve said diagnostic procedures. (Tr. 59-61; CX-2). Dr. Jackson continued to treat Claimant and recommend a lumbar myelogram followed by a CT scan due to Claimant's bulging L4-5 disc, which Dr. Jackson opined had probably gotten worse. (CX-2).

On July 19, 1999, Dr. Jackson issued a medical report based on Claimant's myelogram and CT scan done at Doctors Hospital on July 14, 1999. The myelogram revealed two degenerative discs, one ruptured and one bulging. Dr. Jackson opined that this accounted for Claimant's complaints of pain in the low back and lower extremity. Dr. Jackson recommended surgery to provide probable permanent relief and rehabilitation for Claimant, which surgery has yet to be performed due to Employer's lack of approval. (CX-2). Furthermore, as reviewed above, after reviewing the myelogram and CT scan, Dr. Kinnard agreed with Dr. Jackson, finding the treatment recommended by Dr. Jackson, surgery, appropriate for Claimant's diagnosis, disc herniation. (EX-9, p. 1; Tr. 62-63, 67, 96). Yet, Employer refused to provide treatment as required by the Act.

As established by the record, including the medical evidence as presented by Drs. Kinnard and

Jackson, the treatment procured by Claimant from Dr. Jackson was necessary for treatment of his injury, thus satisfying Claimant's duty under the Act. Consequently, Claimant is entitled to reimbursement of expenses incurred in the treatment of his back injury by Dr. Jackson and additional medical treatment, including surgery by Dr. Jackson, associated with his March 1, 1996 workplace accident under Section 7 of the Act.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724(1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., *aff'd in pertinent part and rev'd on other grounds, sub nom*. Newport News v. Director, OWCP, 594 F.2d 986(4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961(1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See* Grant v. Portland Stevedoring Company, et. al., 17 BRBS 20(1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

V. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the

following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from March 1, 1996 and continuing, based on Claimant's average weekly wage of $410.00. 33 U.S.C. § 908.

2. Employer/Carrier shall receive a credit for state compensation benefits paid from March 1, 1996 to January 28, 1997, 45 weeks, at $285.00 weekly, totaling $12,825.00.

3. Employer/Carrier is responsible for reimbursement of expenses incurred in the treatment of Claimant's back by Dr. Jackson, and future medical treatment for Claimant's back by Dr. Jackson, including but not limited to surgery, under Section 7 of the Act.

4. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 9TH day of April, of 2001, at Metairie, Louisiana.

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CLEMENT J. KENNINGTON
Administrative Law Judge